

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

THE EXECUTIVE BOARD OF THE)
MISSOURI BAPTIST CONVENTION,)
a Missouri non-profit corporation, *et al.*,)

Plaintiffs,)

vs.)

ROBIN CARNAHAN, in her official)
capacity as MISSOURI)
SECRETARY OF STATE, *et al.*,)

Defendants.)

COPY

Case No.: 02CV25096-01

**ORDER GRANTING PARTIAL SUMMARY JUDGMENT FOR PLAINTIFFS ON
COUNT VII AND DISPOSING OF CERTAIN OTHER PENDING MOTIONS**

This case comes before the Court on the Motion for Partial Summary Judgment on Count VII filed by Plaintiffs (the “Convention”¹) against Defendant Missouri Baptist Foundation (the “Foundation”). Having examined the submissions of the parties and heard the oral arguments of counsel, the Court finds – pursuant to Rule 74.01(b) – that there is no just cause for delay and therefore enters this Judgment for Plaintiffs on Count VII against the Foundation, which Judgment the Court considers to be “partial” as to Count VII only in that two aspects of this Court’s remedy will require further proceedings as set forth below. Other motions have been briefed and argued, and these also have been decided herein as described below.

¹ Though the Court of Appeals in *Executive Board v. Carnahan*, 170 S.W.3d 437 (Mo. App. 2005) held that the messengers and Executive Board of the Missouri Baptist Convention were the proper parties in interest in this case, this Court adopts the naming convention employed in *Executive Board v. Windermere*, 280 S.W.3d 678, 683 n.1 (Mo. App. W.D. 2009), and refers to the proper Plaintiffs herein collectively as “the Convention.”

This is a complex case involving many parties represented by some of the very best attorneys in this state. The case has been pending more than eight years, it has found its way to the Court of Appeals at least twice, and it has generated tens of thousands of pages of filings in the Court record. In these pleadings and motions, the parties raise numerous and often complex issues of law, with all parties clinging tenaciously their positions.

But, even in complex cases, there is sometimes a simple truth that cannot be ignored. In such cases, the Court's duty is not to lose sight of that inescapable truth and to vindicate it to the extent the law allows. This is such a case. Here, at least with respect to Plaintiffs' Count VII against Foundation, the unavoidable and uncontested fact is that – prior to Foundation's actions in October of 2001 – the Convention had an absolute and unqualified right to approve or reject all amendments to the Foundation's Charter (and, later, the Foundations' Articles of Incorporation) before those amendments could take effect. In October of 2001, the Foundation deliberately, repeatedly, and surreptitiously ignored the Convention's right solely for the purpose of circumventing and, ultimately, eliminating it.

To be sure, the Convention had and exercised – until the Foundation schemed to eliminate them – other important rights with respect to the operation of the Foundation, including (among others) the right to elect Trustees. But the Convention's most important right with respect to the Foundation was the Convention's right to approve amendments to the Foundation's organizational documents. This was the Convention's most important right because, as the Court of Appeals noted previously in this very case,

that is the right which gave the Convention the power to protect its other rights. In the absence of the Convention's right to control amendments to the Foundation's organizational documents, a court might conclude (as the Court of Appeals did in *Windemere*) that the Convention's other rights were merely illusory, held and exercised only at the will and sufferance of the Foundation. Put another way, it was the Convention's right to control amendments that prevented (or was supposed to prevent) the Foundation from deciding to strip away the Convention's other rights anytime the Foundation wanted.

Summary judgments are appropriate where the movant can demonstrate a right to judgment as a matter of law based upon facts as to which there is no genuine dispute. That is the case here. The movant is entitled to move for summary judgment on "all or any part of the pending issues," Rule 74.04(a), and the Court may grant some of the relief requested and order additional proceedings as to other aspects of relief, Rule 74.04(d). Summary judgment on Count VII of the Fifth Amended Petition is proper on the Convention's motion, and the Court grants some aspects of the relief requested in the motion, denies others, and orders further proceedings on the remaining, unresolved elements of relief requested in Count VII.

Here, the uncontested facts prove – and the Foundation admits -- that, prior to October of 2001, the Convention had the right to approve amendments to the Foundation's Charter (and, later, the Foundation's Articles of Incorporation). The uncontested facts also prove – and the Foundation also admits – that, in October of 2001, the Foundation amended its Charter (and, subsequently, its Articles of Incorporation)

without seeking or receiving the Convention's approval of those amendments. Though the Foundation "disputes" many of the facts alleged by the Convention, it fails to raise a genuine dispute about these material facts. And these facts, alone, establish the Convention's right to judgment as a matter of law, particularly where the uncontested facts also show that the Foundation's "affirmative defenses" pose no bar to that judgment. The Foundation makes a number of arguments that it contends preclude judgment for the Convention but, as set forth below, the Court rejects these arguments. Accordingly, the Court grants the Convention's motion for partial summary judgment on Count VII.

FACTS

The following facts are uncontested in the summary judgment record:

1. On August 5, 1946, the Missouri Baptist Foundation was incorporated by *pro forma* decree of the Circuit Court of Jackson County, Missouri, as a non-profit corporation ("1946 Charter").
2. In 1957, the Foundation filed a Petition in the Circuit Court of Cole County to amend the 1946 Charter, stating: "That said Corporation has never been self-supporting and the major part of its expenses of operation have been paid by the Missouri Baptist General Association[, and] . . . that the Missouri Baptist General Association at its meeting of October, 1956, voted to assume all the expense of operation of the Missouri Baptist Foundation, *upon the condition that certain changes in the Charter of said Missouri Baptist Foundation are changed[.]*" [Emphasis added.] These Charter amendments included (a) that all net income of the Foundation would be

transferred semiannually to the Executive Board as Cooperative Program receipts, (b) that the Executive Board of the Missouri Baptist General Association (now known as the Missouri Baptist Convention) would have the right to appoint Foundation Trustees to any vacancy occurring between regular meetings of the Convention, and (c) that no amendments may be made without prior approval of the Convention or the Executive Board. The Convention approved these amendments before the Petition was filed in Cole County Circuit Court, and the amendments were approved by the Circuit Court and filed with the Secretary of State in due course.

3. In 1989, the Foundation filed a Petition to amend its Charter. In its Petition, it represented to the Circuit Court of Cole County that the amendments “have been approved by the . . . Missouri Baptist Convention.” The Court approved those amendments to the Charter and they were filed with the Secretary of State.

4. On November 4, 1994, the Foundation filed an application in the Cole County Circuit Court to seek approval of its “amended and restated” Articles of Agreement (the “1994 Charter”). The application stated that the amendments “have been approved by . . . the Missouri Baptist Convention.” The Court approved the 1994 Charter on November 7, 1994, and the Foundation filed it with the Secretary of State on November 17, 1994.

5. The 1994 Charter substantially revised, and wholly replaced, the 1946 Charter as amended in 1957 and 1989, including the provisions establishing the Convention’s rights with respect to the governance and operation of the Foundation. The

1994 Charter contains the following provisions relating to the Convention and/or its Executive Board:

- a. The Foundation's purpose, in part, "is to strengthen the mission and ministry efforts of Missouri Baptists within the State and around the world by developing, managing and distributing financial resources for the support of those efforts as the trust services agency of the Missouri Baptist Convention." [1994 Charter, Article IV(A)]
- b. The Foundation did not have the right "to mortgage, hypothecate or otherwise pledge either the real, personal or mixed property, or income therefrom, under [its] ownership without the formal approval in writing of the Executive Board of the Missouri Baptist Convention." [1994 Charter, Article IV(B)]
- c. The Foundation could not distribute "Undesignated Funds" without "the prior approval of the Executive Board of the Missouri Baptist Convention," and the Convention had the right to control designated gifts after such time as the designated object or purpose no longer existed. [1994 Charter, Article IV(C)]
- d. "The Foundation shall make quarterly reports to the Executive Board of the Missouri Baptist Convention." [1994 Charter, Article IV(D)]
- e. The operational costs of the Foundation were paid partially "by allocation from the Missouri Baptist Convention Cooperative Program Allocations Budget." [1994 Charter, Article IV(F)]

- f. In the event of the Foundation's dissolution, it would "distribute all the remaining assets of the Foundation to the Executive Board of the Missouri Baptist Convention." [1994 Charter, Article IV(G)]
- g. Each of the Foundation's trustees was required to be "a member of a Baptist church affiliated with the Missouri Baptist Convention."
(1994 Charter, Article VI)
- h. The Foundation's trustees were required to be "nominated and elected in accordance with the procedures and practices of the Nominating Committee of the Missouri Baptist Convention." (1994 Charter, Article VI)
- i. In the event of an unexpected vacancy on the Foundation's board of trustees, the Executive Board of the Convention "may fill any vacancy" and the "Convention shall, at its annual meeting, fill the vacancy by election of the unexpired term." (1994 Charter, Article VI)

6. The 1994 Charter retained the requirement from 1957 that any amendments to the Charter first be approved by the Convention, but modified the process for obtaining this approval. Under the 1994 Charter, amendments must comply with the following procedures in the following order: 1st) a proposed amendment must receive a majority vote of the Foundation's Board of Trustees; 2nd) the approved amendment must be submitted to the Executive Board of the Convention "for its recommendation of approval to the Missouri Baptist Convention;" 3rd) the amendment then must "receiv[e] the

approval of the Missouri Baptist Convention;” 4th) the Foundation’s officers must then submit a Petition to the Cole County Circuit Court for approval of the amendments; 5th) once approved, the Amended Articles must be filed with the Cole County Recorder of Deeds; and 6th) the Amended Articles must be filed with the Secretary of State. (1994 Charter, Article VIII)

7. In October of 2001, the Foundation undertook a two-step process to eliminate each and every one of the Convention’s rights under the 1994 Charter with respect to the governance and operation of the Foundation. The Court neither knows nor cares *why* the Foundation did this, let alone what disputes (or potential disputes) the Foundation had or feared it would have with the Convention if the Foundation honored the Convention’s rights. Instead, the Court is only concerned with *what* the Foundation did or tried to do. Here, the undisputed evidence supports no other conclusion than that the Foundation engaged in this two-step process in October of 2001 for the sole purpose of eliminating the Convention’s rights with respect to the Foundation governance and operation, knowing that the Convention had not consented and would not consent to the Foundation’s amendments or the elimination of its rights. The evidence shows without question or doubt that this two-step process was designed, agreed to, and implemented in such way as to prevent the Convention from learning of it until the process was complete and the amendments were filed with the Secretary of State.

8. The Foundation’s first step was to eliminate the need for court approval of future Foundation amendments, which process required public filings and hearings

(ordinarily) with advance, written notice. Therefore, on October 5, 2001,² the Foundation submitted a Petition to the Cole County Circuit Court seeking its approval of amendments to the Foundation's Charter that would "accept" the application of Chapter 355 and thus convert the Foundation to a Chapter 355 non-profit corporation (the "October 9 Amendments").³ Once the Foundation was governed by Chapter 355, future amendments could be made without court approval. The Foundation did not inform the Convention or the Executive Board that it was intending to amend its Charter to reflect its "acceptance" of Chapter 355, nor did the Foundation seek or receive the approval of the Convention or the Executive Board for these amendments before presenting them to the Court for its approval. Though the Foundation's prior petitions to the Court to approve charter amendments had contained notice that the required Convention approval had been obtained, the Foundation purposefully omitted from its petition to the Court in October of 2001 both (a) that the Convention's approval was required before any Charter amendments could be submitted to the Court, and (b) that the Foundation had not sought, and had not obtained, the Convention's approval of the October 9 Amendments.

² The Foundation originally sought Court approval of its Charter amendments and articles of acceptance on October 1, 2001, but these articles later were rejected by the Secretary of State for failure to comply with Chapter 355's requirements. The Foundation then brought revised amendments and articles before the Court on October 5, 2001.

³ The Articles of Acceptance, approved by the Court and filed by the Secretary of State on October 9, 2001, were – essentially and expressly – in the form of amendments to the Foundation's Charter, *i.e.*, its Articles of Agreement. In the Articles of Acceptance, the Foundation specifically stated that "for the purpose of amending the Articles of Agreement of the corporation in the manner provided by [Chapter 355] said Articles of Agreement of this corporation be and they hereby are amended so to read in their entirety as follows;" followed by the 1994 Charter with amendments to read as the Foundation's first Articles of Incorporation.

9. On October 9, 2001, the Cole County Circuit Court approved the Foundation's Charter amendments reflecting its "acceptance" of Chapter 355, and the Foundation filed its articles of acceptance and the amended Charter (now in the form of the Foundation's first Articles of Incorporation) with the Secretary of State that same day. This completed the Foundation's first step, and severed all connections with – and any oversight of future amendments by – the Cole County Circuit Court.

10. It should not escape notice that the Foundation's original Articles of Incorporation, which the Court had approved and the Secretary of State had filed on October 9, 2001, *still contained all of the Convention's rights* regarding the governance and operation of the Foundation as those rights had been set forth in the 1994 Charter. For example, the Foundation's original Articles still required that all future amendments had to be submitted to the Executive Board "for its recommendation of approval to the Missouri Baptist Convention" and must "receiv[e] the approval of the Missouri Baptist Convention." Thus, had the Court noticed that neither the Convention nor the Executive Board had been given notice of (or its approval to) the October 9 Amendments, the Foundation could have answered that notice and approval were not important because no "substantive changes" were being made to the Charter. The Foundation might even have said that, because the conversion of the Foundation's Charter into its Articles of Incorporation (and thus the Foundation's conversion to a non-profit corporation under Chapter 355) were simply matters of form, no approval was required. The Foundation would have been wrong had it offered either excuse but, because there is no record that the Court ever knew to make this inquiry, there is no way to know what excuse (if any)

the Foundation might have offered for its failure to give the Convention notice or obtain its approval for the October 9 Amendments.

11. After allowing the Foundation's original Articles of Incorporation to lay undisturbed in the Secretary of State's files overnight, the Foundation then undertook the second step of its plan. On October 10, 2001, with the ink hardly dry on the Foundation's original Articles of Incorporation, the Foundation filed with the Secretary of State a set of amendments to those Articles (the "October 10 Amendments") eliminating all of the Convention's rights including its right to elect trustees, to receive the Foundation's assets in the event of dissolution, to control distribution of undesignated Foundation funds, to receive quarterly reports from the Foundation, and – most importantly – to approve amendments to the Foundation's Articles. The Foundation did not seek, nor did it obtain, the approval of the Convention or Executive Board for the October 10 Amendments prior to – or since – filing them with the Secretary of State.

DISCUSSION

Defendants have raised a number of issues in response to the Convention's motion that Defendants assert preclude summary judgment. The Court addresses many of these below. For ease of drafting, all of the arguments addressed below are attributed to the Foundation even though they may also have been made (or, in some cases, have only been made) by other Defendants in the other motions being disposed of herein. And, due to the number and overlapping nature of these arguments, not every aspect of every argument is addressed below. But, whether addressed or not, and regardless of whether the arguments are correctly attributed, the Court has considered – and now rejects – every

argument by every Defendant in opposition to the Convention's motion for partial summary judgment on Count VII, as well as the other motions disposed of herein.

**A. The Convention has Standing to Challenge the Foundation's
October 9 Amendments and the October 10 Amendments.**

As a preliminary matter, the Foundation challenges the Convention's standing to assert any claim arising out of the Convention's rights established in the Foundation's original Articles of Incorporation and the predecessor Charter. Like many of Defendants' arguments, the collection of arguments under the general heading of "standing" are at their most persuasive when viewed myopically and without regard to their context. Stepping back, however, these arguments are – and must be – wholly without basis. If a non-profit corporation amends its articles of incorporation in plain violation of another's right to approve or reject such amendments – and this amendment goes so far as to purport to eliminate that right in the future – can it really be the law in this state that the entity's whose right was violated (and purportedly eliminated) cannot obtain relief in court? Does the Foundation genuinely contend that it answers to no one, except (perhaps) the Attorney General?

The Court recognizes that, because charitable non-profit corporations seldom have the resources for protracted litigation, this case raises many questions of first impression. And the Court is mindful that its decision must be consistent with the language of the statutes and prior holdings of Missouri's appellate courts. But the Court's decision must also further the policies and principles those statutes and cases establish. In short, the Court's decision must be reasonable as well as lawful. Thus, the Court holds that the

Convention has the right to sue the Foundation to enforce the Convention's right to approve proposed amendments to the Foundation's articles and, where that right has been violated in the past, to seek a fair remedy for such violations.

In general, a party has standing to seek declaratory relief if it "has a legally protectable interest at stake." *Battlefield Fire Protection Dist. v. Springfield*, 941 S.W.2d 491, 492 (Mo. banc 1997). In cases involving charities, *i.e.*, entities who serve the public good, courts have discussed the need for potential plaintiffs to have some "special interest" that differs from that of the public at large. *See Missouri ex rel. Nixon v. Hutcherson*, 96 S.W.2d 81, 83-84 (Mo. banc. 2003) ("in some charitable trusts there may be beneficiaries having such special interest in the performance of the trust as to entitle them to maintain a suit to enforce it"); *Dickey v. Volker*, 11 S.W.2d 278, 281 (Mo. banc. 1928), ("those with a special interest may enforce the trust").

In the context of Chapter 352 organizations, which the Foundation was until the October 9 Amendments, Missouri cases establish a principle that individuals with a "special interest in the charity" have standing to challenge the conduct of such organizations. *See Burnside v. Gilliam Cemetery Ass'n of Gilliam*, 96 S.W.3d 155 (Mo. App. W.D. 2003) (holding that the plaintiff had a sufficient "special interest" in the cemetery association organized under Chapter 352 because his father was buried there). This is consistent with broader standing principles, which require a party seeking declaratory relief to have a "pecuniary or personal interest directly in issue or jeopardy." *NALSO v. Continental Grain Co.*, 901 S.W.2d 127 (Mo. App. W.D. 1995).

The law with respect to claims against a non-profit corporation organized under Chapter 355 is the same, *i.e.*, the Convention must again establish that it has a “legally protectable interest at stake.” *Battlefield Fire Protection Dist.*, 941 S.W.2d at 492. As with Chapter 352 organizations, Missouri cases recognize that entities with a “special interest” in the non-profit organization can sue. *See Masonic Temple Ass’n of St. Louis v. Soc’y for the Preservation of The Masonic Temple*, 70 S.W.3d 24, 26-27 (Mo. App. E.D. 1993).

In all of these “standing” cases, however, the holdings are intended to allow charitable organizations to operate without having to face continual (and perhaps conflicting) legal claims from plaintiffs whose only real interest is that they are within the class of society that the charity is intended to benefit. A charity, corporate or otherwise, could not operate in such an environment. These holdings did *not* arise out of circumstances in which a charitable corporation’s articles of incorporation give the plaintiff clear and specific rights with respect to the governance and operation of the charity that the charity violated and the plaintiff was seeking to enforce. Had such circumstances been present, this Court is certain that there would have been no need for any discussion of a “special interest” requirement because such a plaintiff’s standing to enforce its own express rights (and seek a remedy for a violation of those rights) is too plain to doubt.

But, even if the “special interest” test is applicable, the Court finds that the Convention meets that requirement. Prior to the October 9 Amendments, the Foundation’s Charter gave the Convention various express rights, including the right to

approve amendments to the Charter. The possession and exercise of that right gives the Convention a “special interest in the charity” sufficient to distinguish the Convention from the universe of people and entities for whose benefit generally the Foundation operated to serve. Here, it is uncontested that this specific right is “directly in issue or jeopardy” in this case. Thus, the Court holds that the Convention’s right to approve amendments to the Foundation’s Charter is a “legally protectable interest.”

In addition to the Convention’s “special interest” arising out of its rights as set forth in the Foundation’s Charter and original Articles, the Court also finds that the Convention has a “special interest” in the Foundation because those original Articles provided that one express purpose of the Foundation was to serve as “the trust services agency of the Missouri Baptist Convention.” This alone would be sufficient to confer “special interest” standing on the Convention. *See Masonic Temple Ass’n of St. Louis*, 70 S.W.3d at 26-27 (holding that an entity described in the purpose of the articles of incorporation of a Chapter 355 non-profit has “special interest” standing). The 1994 Charter also expressly sets forth many other significant rights and obligations between the Foundation and the Convention. Any fair reading of the Charter or the original Articles proves that the Convention had a unique and authoritative relationship to the Foundation, elevating the Convention’s interests into the “special” class, *i.e.*, above the interest of the public generally or even that portion of the public that the Foundation generally was intended to serve.

In determining whether the Convention’s “special interest” in the Foundation is sufficient to confer standing, the cases relied upon by the parties also require (either

expressly or implicitly) a sufficient nexus between the interest asserted and the claim being pursued. For example, only a very heightened “special interest” would allow the holder thereof to challenge day-to-day operational decisions of a charity or its board. A lesser showing would be needed were the claim brought has a direct connection to the interests asserted. Here, the “interests” asserted are the Convention’s rights as expressly set forth in the Charter and the original Articles, and the claim is directed at preserving and protecting those rights and remedying the Foundation’s purposeful violation of the same. A more direct connection cannot be hypothesized, and nothing more need be shown by the Convention to establish its standing.

As discussed in greater detail below, Section 355.606 specifically authorizes a non-profit corporation to give a third party the right to approve amendments. The inescapable conclusion of the Foundation’s arguments is that the General Assembly authorized the granting of such a right but intended to to deny the grantee any ability to preserve or protect that right. The Court rejects that conclusion, and thus rejects the Convention’s standing arguments.

B. The Court’s Holding Here Was Foreshadowed in *Windemere*.

It has not escaped the Court’s notice that the Convention’s claims now before the Court are precisely the claims that the Court of Appeals noted *could be brought* in *Executive Board v. Windermere*, 280 S.W.3d 678 (Mo. App. W.D. 2009). Moreover, the Court of Appeals in that decision dismissed the Convention’s claims against another defendant in this case specifically because the facts there did not allow the Convention to bring a claim under Section 355.606 of the sort that the Convention is asserting here

against the Foundation. Accordingly, though the discussion in *Windemere* was just that – a discussion – it was much more than the uninformed *dicta* that the Foundation contends it to be. Facing the uncontested facts that were so glaringly absent in *Windemere*, this Court’s reaches the same conclusion that was so obvious to the Court of Appeals, *i.e.*, that a third-party has standing to sue a non-profit corporation regarding amendments to that corporation’s articles when – but only if – the corporation’s prior articles gave that party the right of prior approval regarding such amendments.

In the same lawsuit that is now before the Court, the Convention brought claims (in addition to its claims against the Foundation) against a number of other organizations that had (like the Foundation) taken actions without notice to or approval from the Convention, which actions (like those of the Foundation) were intended to eliminate all aspects of the Convention’s control over their separate governance and operation. Among these other defendant organizations that the Convention claims wrongfully attempted to throw off the Convention’s yoke was the Windemere Baptist Conference Center (the “WBCC”). There, the WBCC amended its articles of incorporation to eliminate the Convention’s rights to elect the WBCC’s trustees and the Convention’s (or its affiliate’s or designee’s) right to receive the WBCC’s assets upon dissolution. But, the critical difference between the Convention’s claims against the WBCC and the Convention’s claims against the Foundation is that the Convention did not have the right to approve or reject amendments to the WBCC’s articles and thus could not – and did not – assert a claim against the WBCC like the Convention’s Count VII against the Foundation.

In *Windermere*, after engaging in a protracted and complex analysis of precisely the sort that the Foundation would have this Court perform again here, the Court of Appeals held that the Convention lacked standing to claims against WBCC. In so holding, the Court specifically rejected the argument that WBCC's pre-amendment articles gave the Convention's standing to sue to undo the amendments.

In this case, *nothing in the articles prevented Windermere from unilaterally amending its articles*. The rights given to the Convention under Windermere's original articles of incorporation were not "fixed, unalterable, irrevocable" rights but were rights subject to amendment by Windermere. Windermere's original articles, therefore, did not create any enforceable contract rights for non-members like the Convention.

Moreover, *if the Convention had actually intended to preserve certain alleged rights, it could have used section 355.606 to preserve those rights*. The Convention's agents drafted and filed Windermere's original articles of incorporation, and the Convention's messengers ratified the original articles. *Under section 355.606, the Convention had means available to it to protect any interests it may have had in Windermere, but it did not take advantage of those means*. The Convention cannot now use section 355.586 to re-write Windermere articles so that the Convention's rights are now protected.

Windermere, 280 S.W.3d at 692 (emphasis added).

In other words, the Court of Appeals said that the extended (and ultimately unsuccessful) legal gymnastics engaged in by the Convention in an attempt to justify its standing could have been avoided by simply inserting a provision in the WBCC's articles giving the Convention the right to approve amendments to those articles. The Court strongly implies that, if this had been done, that right would have converted all of the Convention's other rights into the "fixed, unalterable, irrevocable" rights needed to give the Convention standing. But, the Court did not even need to pursue that logic because

the language quoted above reflects no doubt that – in such a case – the Convention would have a plain right to sue to enforce its rights under Section 355.606 and thus no other analysis of “standing” would be needed. This is such a case, and so this Court holds.

C. Section 355.141 Does Not Bar the Convention’s Claim.

The Defendants contend here, as they did in *Windemere*, that Section 355.141 bars any claim by the Convention that the October 9 Amendments and the October 10 Amendments are invalid as a result of the Foundation’s flagrant and purposeful refusal to comply with the amendment approval provisions in its Charter and original Articles, respectively. To reach this conclusion, of course, the Foundation must succeed in characterizing the Convention’s claim as the sort of challenge to the Foundation’s “power to act” that Section 355.141 prohibits unless brought by a member, a director or the Attorney General.

At the outset, the Court notes that Section 355.141 cannot bar the Convention’s claim that the October 9 Amendments are invalid because those amendments were adopted by the Foundation when it was still a Chapter 352 entity. There is no similar statute in Chapter 352, and thus the Foundation’s arguments – even if successful – do not prohibit judgment in the Convention’s favor regarding the first amendments. More important, however, is that Section 355.141 also does not prohibit the Convention’s claims regarding the October 10 Amendments, even though these amendments were adopted after the Foundation became a Chapter 355 corporation, because the Convention’s Count VII does not challenge the Foundation’s power to act.

Challenges that corporate actions were invalid on the ground that the corporation lacked “authority” to take the action, *i.e.*, that the action was “*ultra vires*,” were all the rage nearly a century ago. These claims reflected now-anachronistic fears about corporations and early legislative and judicial attempts to limit their powers. Such claims quickly became disfavored, however, because of the havoc they wreaked upon innocent third parties who relied to their detriment on apparently lawful actions by corporations only to learn later that the action fell outside the corporation’s limited powers. The judicial decisions branding such claims as disfavored – which came long before the latest version of the Model Non-Profit Act in which Section 355.141 first appeared – reflected the more modern view that corporations should be encouraged and innocent third-parties protected. Absolutely none of this, however, has anything to do with the use to which the Foundation would now put Section 355.141.

As the Foundation would apply Section 355.141, no action taken by a non-profit corporation could ever be challenged – or remedied – except in a suit brought by the attorney general, a director, or a member. As with many of the Foundation’s other arguments, the initial appeal of this argument upon first glance (assuming it has any) vanishes immediately when the argument is examined more closely. The argument ignores the obvious fact that corporate actions – including actions by non-profit corporations – are just as subject to challenge as any other entity’s actions. A non-profit corporation’s actions can result in the corporation being charged and convicted of a crime. Actions taken by (or on behalf of) a non-profit corporation can result in a civil judgment against the corporation if that conduct constituted a tort (intentional or

negligent) or a breach of a contract. And the list goes on and on. If the Foundation built a fence around its building, which fence happened to extend fifteen feet onto the Convention's property, would the Foundation assert that Section 355.141 prohibits the Convention's lawsuit to declare that action to be a trespass and to force the Foundation to remove it? Would the Foundation argue that such a lawsuit is an impermissible challenge to the Foundation's "power" to build a fence, which it clearly has? Of course not. This case is no different.

In an effort to describe what seems so obvious (to everyone other than these Defendants), the Court of Appeals attempted to distinguish "contract claims" against a non-profit corporation from claims challenging that corporation's power to act. This discussion was helpful in pointing out that the application of Section 355.141 depends more on the *basis* on which a plaintiff challenges a non-profit corporation's action than it does on the *action* being challenge. But it does not mean the entire universe of claims that could ever arise out of any action by a non-profit corporation must be divided into (1) contract claims, which are permitted, and (2) "*ultra vires*" claims, which Section 355.141 prohibits. That is the Foundation's position, however, and it seeks repeatedly to impale the Convention on the horns of this wholly imaginary dilemma.

Even if the Foundation succeeds in its efforts to pigeonhole the Convention's claims, the Foundation will not prevail. There is no question that the Foundation's articles are a contract of sorts. And, because the Foundation's original articles plainly intended for the Convention to benefit both generally (in its statement of purposes) and specifically (in giving the Convention the right to approve or reject amendments, among

other rights), the Convention has the right sue the Foundation to enforce those rights.⁴

But, this is the analysis that this Court already has held – and the Court of Appeals plainly believed – was unnecessary when a third-party with the right to approve or reject amendments under Section 355.606 sues to enforce that right.

Accordingly, the Court holds that Section 355.141 does not prohibit the Convention’s claims. The Foundation’s proposed application of Section 355.141 would place it squarely at odds with Section 355.606 in a way that is plainly contrary to the manifest intention of the General Assembly. If the legislature had intended for the right authorized in Section 355.606 to be enforceable only by the state’s one and only (and all too busy) Attorney General, or by the members or directors of the corporation who had

4 As noted above, the Foundation has sought to force the Convention to choose between a “powers” challenge, which might be barred by Section 355.141, and a “contract” claim, which Defendants would argue precludes declaratory relief and/or is barred by some affirmative defense peculiar to such actions. This is a false choice, however, and so the Court has held. The Court already has held that Count VII does not violate Section 355.141. And, the Court also rejects the Foundation’s assertion that the rights asserted (and now vindicated) in Count VII can only be analyzed as “contract” claims. True, the Charter and Articles from which the Convention’s rights arise are, in some sense, contractual and the Convention may be entitled to pursue a contractual theory of relief and obtain contractual remedies in addition to the relief granted herein. The Convention has additional counts still to be litigated in which those issues can be explored. In this Judgment, however, the Court grants the Convention declaratory relief (and other related remedies) only as to Count VII and solely on the ground that the Foundation violated its Charter (and Articles) and that the Convention has the right to sue to enforce the provisions violated and obtain a fair remedy for the Foundation’s actions. It has not been necessary for the Court to evaluate Count VII under a contract analysis, though the Court would have reached the same conclusions and granted the same relief if it had done so. For these reasons, the Court perceives no conflict between this Judgment and the Court’s Judgment dated August 7, 2007, or the statements of Convention’s counsel in response to this “false choice” argument as it related to Defendants other than the Foundation.

just violated that right, such an absurd outcome must be more plainly compelled than shown by the concatenation of arguments advanced by the Foundation.

Plainly, the Foundation has the *power* to amend its articles just as every corporation has that power. But, just as plainly, the manner in which the Foundation exercised that power with respect to the October 9 Amendments and the October 10 Amendments violated the Convention's rights under the Charter and the original Articles. Therefore, the Convention may sue to enforce those rights and seek a remedy for those violations, and it can do so without those claims being characterized as "*ultra vires*" challenges for sole purpose of shutting them down under Section 355.141. *See Classis of Central California v. Miraloma Community Church*, 177 Cal. App. 4th 750, 769 (Ct. App. 2009) ("We do not read [California's equivalent to § 355.141] as forbidding the right of third parties to enforce their legally conferred power of consent [to amendments]. In other words, an action to enforce such consent provisions is not an unauthorized third party action to limit the powers of the corporation . . . If [§ 355.141] were a bar to proceeding to enforce a consent clause, [the local equivalent to § 355.606] would be meaningless. The designated third party would have no remedy where, as here, the board of directors amended the articles or bylaws without the required approval.").

D. The Convention's Right to Approve Amendments

Was Not Rendered "Unenforceable" by Section 355.606.

The Foundation argues that, pursuant to Section 355.606, a non-profit corporation may only "require an amendment to the articles or bylaws to be approved *in writing* by a specified person or persons other than the board." And, because the provisions of the

1994 Charter and the original Articles giving the Convention the right of prior approval over amendments did not expressly require that the Convention's approval be *in writing*, the Foundation contends that these provisions became unenforceable the minute Section 355.606 became applicable, *i.e.*, as soon as the illicit October 9 Amendments were filed with the Secretary of State. Thus, the Foundation concludes that it was free to ignore the Convention's rights with impunity when it adopted the October 10 Amendments.

Before stating its reasons for rejecting this argument, it is helpful to restate the question more plainly: Should the Convention lose the rights that it had (and had used) under the 1994 Charter simply because, without the Convention knowing about or approving it, the Foundation amended the 1994 Charter and converted it into Articles of Incorporation that contained (at best) minute inconsistencies with a statute that had not been enacted when the Convention approved the 1994 Charter and that would never have been applicable to the Foundation but for the Foundation's surreptitious and unapproved amendments? To ask the question is to answer it.

First, as above, the Court notes that this argument – at best – can only apply to the October 10 Amendments. The October 9 Amendments were approved while the Foundation was a Chapter 352 organization and Section 355.606 was irrelevant to that process. Moreover, even as to the October 10 Amendments, the Court rejects the Foundation's attempt to turn Section 355.606 on its head. This statute was intended to make it clear that Chapter 355 corporations could grant the "prior approval" right that the Foundation had long ago given (for consideration) to the Convention, something that the common law recognized Chapter 352 organizations could do even though there was no

express provision like Section 355.606 in Chapter 352. The legislature's inclusion of the "in writing" provision in Section 355.606 seems plainly intended as a means of preventing disputes over whether approval had been obtained, *not* as a means by which a non-profit can purposefully violate the third-party's "prior approval" rights and escape having to take responsibility for such a violation. Here, there was no ambiguity over whether the Convention's approval had been secured in some fashion other than in writing. The Convention never approved the October 10 Amendments, and the Foundation knew it.

In addition, the uncontested facts refute the Foundation's claim that the provisions in the 1994 Charter (and its predecessor Charters as well as its successor Articles) giving the Convention the right to approve amendments did not comply with the "in writing" provision in Section 355.606. The language of the Foundation's original Articles plainly required the Convention to approve the amendments before they could become effective, and all of the Convention's actions are reflected in its written records. The uncontested facts show that Convention's approval of every amendment prior to the surreptitious October 9 Amendments and October 10 Amendments *was* reduced to writing and, in fact, it is difficult to see how the Convention *could* act other than through those records. Thus, the only reasonable construction of these provisions in the 1994 Charter (and, ultimately, in the Foundation's original Articles) is that the approval referred to must be given in writing. Certainly this is the only construction that is consistent with the parties' prior course of conduct or course of dealing and true to the parties' intent that these provisions

be effective and binding. Accordingly, the Foundation's argument fails as a matter of uncontested fact.

Finally, this argument fails for a much more basic, and troubling, reason. It is simply unconscionable for the Foundation to purposefully violate the Convention's right to approve amendments to the Foundation's Charter (and Articles) and then argue that this right is unenforceable because of an inconsistency *that the Foundation itself created*. The Court has held, above, that there is no inconsistency between the provisions of the 1994 Charter (or the original Articles) and Section 355.606. But, even if there is, Section 355.606 would never have applied – consistently or otherwise – if the Foundation had not decided to cheat the Convention out of its rights to begin with.

Remember, the Convention's right at issue here, which the Foundation would have this Court toss away as unenforceable because it is "inconsistent" with Section 355.606, was characterized by the Court of Appeals in *Windemere* as the linchpin right, the right on which every other claimed right must depend, and the right whose absence in *Windemere* resulted in the loss of the Convention's claims against the WBCC. So when and how was the Convention supposed to protect this all-important right? When and how was the Convention supposed to spot and cure the defect now alleged by the Foundation? Not in 1957, when the Convention first secured this right – or even in 1994 when the Convention last approved changes to these provisions – because the statute that supposedly created this fatal inconsistency (Section 355.606) had not even been enacted. And certainly not between the passage of this statute and October, 2001, because – as a Chapter 352 organization – Section 355.606 did not apply to the Foundation and thus

there was absolutely no cause for the Convention to worry about the need for consistency between that statute and the 1994 Charter. And obviously not in October of 2001 because the Foundation did all it could to prevent the Convention from learning about the October 9 Amendments and the October 10 Amendments (let alone exercising its right of prior approval regarding them) until after the Foundation had stripped out of its Articles every meaningful right the Convention had.

In *Windemere*, the Court of Appeals rightly criticized the Convention for failing to protect its own interests, but that criticism simply cannot reasonably be made here. The very least that the Convention is entitled to is an inference that, had the Foundation sought the Convention's approval of the October 9 Amendments as it was required to do, the Convention would not have given that approval until the provisions of the amended Charter (which would become the Foundation's original Articles) were tailored to conform to the requirements of Chapter 355, including Section 355.606. The inconsistency (if it is one) between the Convention's prior approval rights and Section 355.606 surely would have been caught and corrected. Just as surely, the Convention would have caught and corrected the mistake of perpetuating into the Foundation's original Articles the provision from the 1994 Charter requiring amendments to be approved by the circuit court – an eye-catching anachronism for a corporation governed by Chapter 355.⁵ Finally, if the Convention had been given its right of prior approval, the

⁵ As with the supposed inconsistency with Section 355.606, the Foundation argues that because *it* left this court-approval provision in the Foundation's original Articles, the *Convention* lost its right of prior approval of all subsequent amendments to those Articles. This argument, too, is rejected.

Court is convinced that the Convention would have ensured that the new Articles were perfectly clear that the Convention was a “member” of the Foundation as that term is used and defined in Chapter 355. Had the Convention done so (*i.e.*, if it had been given the *opportunity* to do so) this change would have prohibited the Foundation’s self-serving self-assessment that it had “no members,” which declaration fuels most of the Foundation’s standing arguments here as it did in *Windemere*. Of course, if the Convention had been given its right of prior approval regarding the October 9 Amendments, it might not have approved them at all, even with the changes set out above. It might simply have rejected them outright – as it certainly would have done with the October 10 Amendments – which sheds some light on why the Foundation refused to honor the Convention’s right to begin with.

For the Foundation now to attempt to take advantage of the discrepancies (actual or otherwise) that the Foundation *itself* created between certain provisions of the Foundation’s original Articles (which the Convention never saw or approved) and certain provisions of Chapter 355 (which the Convention never had reason to know was, or ever would be, applicable) is more than absurd, it borders on the offensive. Particularly when the Convention presumably would have found and corrected these very same discrepancies if the Foundation had simply honored the Convention’s approval rights to begin with. Accordingly, the Foundation’s argument that the Convention’s rights of prior approval were unenforceable is rejected.

E. The Convention Is Not Judicially Estopped from Claiming a Violation of Its Rights to Approve Foundation Amendments.

The Foundation argues that the Convention is judicially estopped from claiming that the Foundation violated the Convention's right to approve amendments due to statements made on the Convention's behalf in wholly unrelated litigation in another court more than a generation ago. The Court rejects this argument for several independent reasons. First, the other litigation concerned whether the Convention could be liable under the doctrine of *respondeat superior* for a hayride accident at Southwest Baptist College in 1983. Thus, the issues in that case differed dramatically from the issues now before this Court. The doctrine of judicial estoppel prohibits a litigant from taking one position in one court and a different, contradictory position in another court. Unlike most forms of estoppel, which are designed to protect the reasonable reliance of third-parties, the purpose of judicial estoppel is to protect the "dignity of the court." Here, however, the Court senses no affront to its dignity (or to that of the Jackson County Circuit Court a generation ago) and so declines to apply the doctrine on the present facts.

More important, even if the Court were inclined to hold the Convention to statements made on its behalf in that long-ago and far-away case, those statements concerned only the relationship between the Convention and Southwest Baptist College. Even judicial estoppel will not now preclude the Convention from taking a different position with respect to a different relationship between the Convention and a different corporation based upon different articles of incorporation. Thus, the Foundation's argument goes well beyond what the doctrine of judicial estoppel provides, and farther than this Court is willing to go. Accordingly, the Foundation's estoppel argument is rejected.

**F. The Foundation’s “Affirmative Defenses” Do Not
Preclude Summary Judgment for the Convention.**

The Foundation argues that the Court cannot grant the Convention’s motion for summary judgment because the Convention failed to negate each of the Foundation’s blizzard of affirmative defenses. First, a summary judgment movant need only refute the elements of *properly pleaded* affirmative defenses. *ITT Commercial Finance v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 381, 383-84 (Mo. banc 1993). Though the Foundation asserts twenty-seven so-called “affirmative defenses,” even a casual glance demonstrates that most of these are not “affirmative defenses” at all and some that might be are not supported by an adequate “short and plain statement of the facts” as required by Rule 55.08. Instead, most of these “affirmative defenses” are simply re-treads of the same legal arguments advanced – and rejected – above. Others assert legal arguments that have been rejected in earlier appeals in this case or that are no longer tenable under current law (*i.e.*, attacks as to this Court’s “subject matter jurisdiction”). Finally, several of these “affirmative defenses” by their own terms simply do not apply to the Convention’s Count VII at issue in this motion. Suffice to say that the Court has reviewed each of these “affirmative defenses” and holds that none of them pose an obstacle to this Judgment in favor of the Convention based upon the uncontested material facts contained in the summary judgment record.

REMEDY

For all of the reasons set forth above, the Court holds that the Convention is entitled to summary judgment on its Count VII. But, because Count VII seeks a

declaratory judgment, it remains for the Court to state what that declaration will be. For example, the Convention seeks a declaration that the signing and filing of the October 9 Amendments and the October 10 Amendments constituted the “signing of a false document” in violation of Section 355.056. (See Fifth Amended Petition, ¶ 308.6). But Section 355.056 is a criminal statute and it is not appropriate for this Court to “declare” that a crime has been committed even where it has.

By far the most troubling aspect of the relief sought by the Convention, however, is its request that the Court declare the October 9 Amendments and the October 10 Amendments each void *ab initio*, and that the Court declare void all of the actions taken by the Foundation over the last nine years unless these actions are ratified by the Convention or its designees in the near future. This remedy is unjustified, however, not because of any uncertainty as to the Foundation’s wrongdoing (which is clear), but because of the havoc it would create with respect to third-party rights and interests that may have attached as a result of these actions. As noted above, the policy behind the judicial disfavor of “*ultra vires*” claims – now embodied in Section 355.141 – is to protect the rights and expectations of those who rely on the apparently lawful actions of non-profit corporations. Whether interrupted by an arcane and hyper-technical “*ultra vires*” claim (which this is not) or by an internecine power struggle resulting in improperly amended articles and nearly a decade of illegitimate director elections (which this was), a retrospective remedy under Count VII would present the same potential for disruption and thus the same need for judicial caution.

The Court has, perhaps, reviewed every reported case involving amendments to articles made without the approvals required by state law or the corporation's own articles. Though there are not many such cases, the greater weight of this authority holds that such amendments are voidable rather than void *ab initio*. This distinction acknowledges that corporations have the legal power to amend their articles of incorporation (and thus actions challenging improper amendments do not violate Section 355.141 or its sister provisions around the country), but also ensures that corporations are subject to suit and a proper remedy when they amend their articles improperly or in violation of a third-party's approval rights. *See, e.g., Kappa Sigma Fraternity, Inc. v. Kappa Sigma Fraternity*, 587 S.E.2d 701, 708 (Va. banc 2003) ("because the adoption of the ... amendments was within the Foundation's power conferred by statute, the Board's approval of those amendments [without the necessary approvals] was a voidable, rather than void, act of the corporation").

Of course, this precise issue is not addressed expressly in each of this very small body of cases. Often, the intention to forge a remedy only on a prospective basis (at least with regard to completed actions and the rights or expectations of third-parties) appears only by inference. *See McDaniel v. Frisco Emp. Hospital Ass'n*, 510 S.W.2d 752, 759 (Mo. App. 1974) (remanding with instructions that the trial court declare the amendments "void" but, in context, no retroactive "unwinding" of third-party rights or expectations appears intended or expected); *Barnett v. Hicks*, 792 P.2d 150 (Wa. banc 1990) (declaring the amendments were ineffective and remanding for further proceedings, but suggesting that other actions after the amendments not necessarily void); *Nat'l Bd. of*

Examiners v. American Osteopathic Ass'n, 645 N.E.2d 608 (Ct. App. Ind. 1994) (vindicating third-party's approval rights without suggesting that otherwise lawful interim board actions were invalid); *Classis of Central California v. Miraloma Community Church*, 177 Cal. App. 4th 750 (Ct. App. 2009) (preliminary and permanent injunctions granted based on declaratory relief, with prospective effect only).⁶

But, whether express or not, the Court is convinced that these decisions reflect the wiser course, *i.e.*, that the proper remedy is one that is prospective only insofar as it impacts completed Foundation actions affecting innocent third-parties.⁷ Accordingly, the Court holds that the October 9 Amendments and the October 10 Amendments are voidable rather than void *ab initio*.

DECLARATORY AND OTHER RELIEF

On the basis of the foregoing, the briefs of the respective parties and the arguments of counsel, the Court hereby enters Judgment for the Convention on Count VII of the Fifth Amended Petition and, further, makes the following declarations, imposes the following related remedies, and orders additional proceedings relating to two other remedies as set forth below:

⁶ It should be noted that none of the courts in these cases doubted that a party with the right to approve corporate amendments had standing to vindicate that right in court. In fact, the Foundation never cited the Court to a single case from any jurisdiction in which a party with the right to approve corporate article amendments was held to lack standing to sue and assert that right when violated.

⁷ As noted above, the Convention has also has pending Counts based upon contractual claims and seeking contractual remedies. Other than the facts forming the uncontested basis for the Judgment and the Court's legal conclusions, which will be law of this case until reversed or vacated on appeal, nothing in this Judgment should be taken as either favoring or prohibiting such Counts or such remedies.

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THAT, on October 9, 2001, the Foundation knowingly and purposefully violated the provisions of its 1994 Charter when it obtained court approval of, and filed with the Secretary of State, amendments to this Charter in the form of “Articles of Acceptance” without having obtained the prior approval of the Convention for such amendments even though the Convention’s right of prior approval for such amendments was plainly and unequivocally provided for in that Charter;

THAT, on October 10, 2001, the Foundation knowingly and purposefully violated the provisions of its original Articles of Incorporation (dated October 9, 2001) when it filed with the Secretary of State amendments to those Articles without having obtained the prior approval of the Convention for such amendments even though the Convention’s right of prior approval for such amendments was plainly and unequivocally provided for in those Articles;

THAT, because of these knowing and purposeful violations of its own Charter (with respect to the October 9 Amendments) and its own Articles (with respect to the October 10 Amendments), the Articles of Agreement (comprised of and containing amendments to the Foundation’s Charter) approved by the Circuit Court and filed with the Secretary of State on October 9, 2001, and the amendments to the Foundation’s Articles filed with the Secretary of State on October 10, 2001, were voidable and are herein and hereby declared void;

THAT, within 30 days of this Judgment (which time will be tolled if this Judgment is stayed), the Foundation will cause to be filed in Division I of this Court (in Case No. 19V010017523) a notice of this Judgment stating that the Charter amendments

approved in the Decree dated October 9, 2001, have been declared void on this date and henceforth by this Judgment, and to cause to be filed with the Secretary of State a notice that the Foundation's Articles of Acceptance (filed on October 9, 2001) and the amendments to the Foundation's Articles of Incorporation (filed on October 10, 2001) have been declared void on this date and henceforth by this Judgment;

THAT the foregoing declaration that these two sets of amendments are, this day and henceforth, void will not have the effect of invalidating any action of the Foundation completed between the dates of these voidable amendments and the date of this Judgment except as herein and hereinafter provided by this Court;

THAT, as of the date of this Judgment, no Director or Trustee of the Foundation not elected in accordance with the 1994 Charter (which was in effect before these two voidable amendments and is now in effect as a result of this Judgment) shall immediately forfeit that office as a result of this Judgment and shall not from the date of this Judgment be authorized to act for or on behalf of the Foundation;

THAT any vacancies in the office of Director or Trustee of the Foundation at the time of, or as a result of, this Judgment shall be filled in accordance with the 1994 Charter or as it may in the future be properly amended, and any Director or Trustee whose office is forfeited by this Judgment may serve if so elected;

THAT the Foundation shall pay the Convention's costs and attorney's fees in prosecuting the claims that resulted in this Judgment and such additional costs and fees as the Convention may incur in defending this Judgment or as a result of any additional

proceedings called for in this Judgment, with the amount of such fees be determined in additional proceedings before this Court;

THAT the Foundation shall not make any payments pursuant to any “Golden Parachutes” allegedly agreed to by the Foundation in order to “protect and compensate its management employees in the event [Convention-elected] trustees regain control of [the] Foundation,” (*see* Fifth Amended Petitioner, ¶¶ 131, 308.16), until additional proceedings can be held so that this Court can determine whether such agreements (if any) are valid and not unenforceable or void as against public policy, and whether such contracts may have given rise to any personal liability on the part of any of the individuals involved;

THAT the Court denies all relief requested with respect to Count VII not granted herein or made the subject of further proceedings; and

THAT the Court enters this Judgment on Count VII, even though it does not dispose of all of the claims against all of the Defendants (or even all of the claims against this single Defendant), because the Court finds there is no just cause for delay pursuant to Rule 74.01(b), and thus this Judgment on this Count is final and no longer subject to revision by this Court except for the two aspects of the Court’s remedy regarding which the Court has ordered additional proceedings above.

DISPOSITION OF OTHER MOTIONS

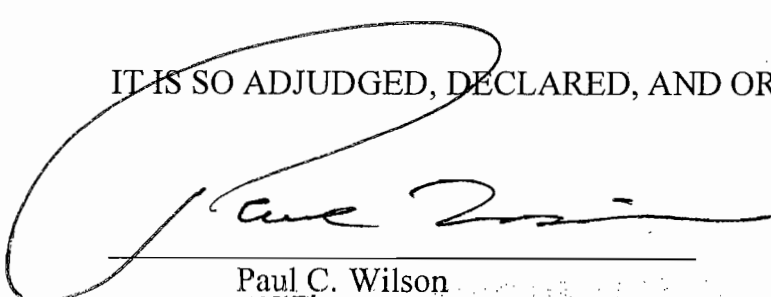
On the basis of the foregoing, the briefs of the respective parties and the arguments of counsel, the Court also: (a) DENIES the Plaintiffs’ Motion for Summary Judgment on Count IX (dated September 24, 2007) as moot; (b) DENIES the Foundation’s Motion for Summary Judgment (dated December 15, 2006) in its entirety;

(c) DENIES the Foundation's Motion to Dismiss Count VII (dated October 30, 2006) in its entirety; (d) DENIES Defendants' Joint Motion to Dismiss Counts I, IV, VII, XI and XV (dated October 30, 2006) in its entirety; and (e) DENIES all other pending motions to the extent inconsistent with the uncontested facts established in this summary judgment record or the Court's legal conclusions herein expressed.

NEITHER THIS JUDGMENT NOR THE CASE IS STAYED

The Court has considered whether to stay this Judgment (and/or the other proceedings ordered herein or the litigation of the remaining Counts in this case) on its own motion in order to facilitate interlocutory appellate review. Though the Court sees no reason why appellate review of this Judgment should be delayed – and hopes it is not – after considering all of the circumstances the Court has determined that any such stay should be ordered by the appropriate appellate Court and then only to the extent it deems such a stay necessary or appropriate. Therefore, this Court declines to stay the effect of this Judgment or any other aspect of this case.

IT IS SO ADJUDGED, DECLARED, AND ORDERED,


Paul C. Wilson
Circuit Judge

12-31-10

Date

STATE OF MISSOURI
COUNTY OF COLE
I, BRENDA A. UNSTATTD, Clerk of the Circuit Court of Cole County, Missouri,
heraby certify that the above and foregoing is a full true and correct copy of

as fully as the same remains of record in my said office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the
seal of said office this 3 day of Jan 2011.
BRENDA A. UNSTATTD, Clerk

Esperanza
Circuit Court of Cole County, Missouri